82-2051

No.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

GIDDINGS & LEWIS MACHINE TOOL COMPANY,
Petitioner

v.

JOHN AND PATRICIA TRAPANESE,
Respondent

v.

HONORABLE LOUIS H. POLLAK,
Respondent

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN TRAPANESE AND PATRICIA HANDO TRAPANESE, h/w	:	Civil Action
v.	:	
GIDDINGS AND LEWIS MACHINE TOOL COMPANY	:	No. 81-1161

MEMORANDUM/ORDER

1. In this strict liability case the jury started its deliberations on Thursday, December 23, resumed on Friday, December 24, and completed its work on Monday, December 27.

2. On the jury's first day of deliberations, it asked certain questions in writing. One of these questions was whether the alleged defect in the vertical boring mill manufactured by defendant had to be "the primary or the most probable cause of the accident, or was it only necessary to feel that it contributed to the accident."

3. In response to that question, I reread to the jury the portion of the charge dealing with proximate cause. According to that instruction, the jury was advised that the alleged defect did not need to be the only cause "but had to be a substantial, discernible" cause. I denied the request of plaintiffs' counsel that I instruct the jury that any negligence on the part of plaintiff John Trapanese was not to be considered by them. I reasoned, as I explained to counsel, that because in a strict liability context I had not included any material on comparative or contributory negligence in my charge, I thought it inappropriate to introduce such concepts to the jury at this point in its deliberations, especially since it could conceivably be taken as a prod to resolve the issue of causation in plaintiffs' favor.

4. On the second day of its deliberations, the jury asked for "a restatement of the answer to our second question yesterday. . . ."

5. This time, in responding to the jury, I prefaced my rereading of the proximate cause instruction with the direct answer "no" to the question whether the alleged defect had to be "the primary cause or the most probable cause of the accident." Once again, I declined to instruct the jury that it should disregard any perceived negligence on the part of John Trapanese.

6. On Monday afternoon, December 27, the jury returned a verdict for the defendant. Pursuant to that verdict, judgment has been entered in favor of the defendant and against the plaintiffs.

7. Since the return of the verdict, I have been giving further thought to the jury's questions and my responses thereto. I have come to the conclusion that on December 24 when the jury, for a second time, asked about causation I should have explained the non-relevance of John Trapanese's conduct. If the jury was concerned with Mr. Trapanese's conduct, such an instruction, properly couched, would presumably have guided the jury back to its proper course. If the jury was not concerned with Mr. Trapanese's conduct, the instruction, properly couched, would have been a harmless superfluity.

8. Having come to the conclusion that on December 24 I should have responded more fully than I did to the jury's reiterated question about causation, I have determined, on my own motion, to set the jury's verdict aside and direct a new trial.

9. WHEREFORE,. pursuant to Rule 59(d) of the Federal Rules of Civil Procedure, I hereby DIRECT that the judgment entered on December 28, 1982 be vacated and I ORDER and DIRECT that a new trial be had.

JANUARY 4, 1982 POLLAK, J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-3098

GIDDINGS & LEWIS MACHINE TOOL COMPANY,
Petitioner

v.

HONORABLE LOUIS H. POLLAK,
Respondent

v.

JOHN AND PATRICIA TRAPANESE

Present: WEIS, GARTH* and BECKER, *Circuit Judges.*

ORDER

After consideration of the Petition for Writ of Mandamus and the Answer filed by John and Patricia Trapanese, it is

ORDERED that the Petition for Writ of Mandamus is denied.

By the Court,

Circuit Judge

DATED: March 24, 1983

* Judge Garth was a member of the panel to which this matter was originally submitted. He became ill and did not participate in the final decision.

* * *

THE COURT: All right, I will then ask counsel to come to side bar for a second.

(Side bar discussion on the record, as follows:)

THE COURT: You can tell me now where I have slipped up if there are things other than what we have already had discussions about and rulings on.

MR. SCHWARTZ: Your Honor, I take no issue with the charge as given. Some of the plaintiffs' requested points were not given, but I assume that it's the Court's position they are in fact covered.

THE COURT: That is my belief, yes.

MR. POST: I do the same thing, your Honor. There is one little problem, and I don't even know whether I want you to say it to the jury — the $32,000 item did include overtime.

THE COURT: It did?

MR. POST: Yes. I won't even make an issue of it, sir.

THE COURT: That was a —

MR. SCHWARTZ: That's not your fault, sir, because there was a change made and nobody brought it to your attention. If counsel wants it to be corrected, I don't object.

THE COURT: I'd be glad to do that. That's funny, as I was reading it I was wondering about it.

MR. SCHWARTZ: Counsel is correct on that point.

MR. POST: Okay, would you please, sir?

THE COURT: Sure.

(End of side bar discussion.)

THE COURT: There is one matter which I should correct.

I was quite in error on one matter that goes to the amount of damages that have been proved with respect to past lost earnings.

You may remember Mr. Schwartz and I had our discussion of whether the earnings period went from '79 to '80 or '81, and it went to 1980, and the figure in question that I gave you was $32,000 based on average weekly earnings of $500 for that period of approximately a year-and-a-quarter. All that is well and good. The error came in my telling you immediately thereafter that this figure of $32,000 does not include overtime and fringe benefits. That was almost right, but the right sentence would have been this figure does include overtime and fringe benefits. $32,000 is a comprehensive figure that includes the entirety of lost earnings to date.

I think that will correct it.

MR. SCHWARTZ: May we see you at side bar for one moment? Because I did have a question and neglected to bring it to your Honor's attention.

THE COURT: All right.

My friends, you may retire now to a well-deserved lunch which I envy you, and go to work. And if I hear nothing from you earlier than 5 o'clock, I will ask you to come in at that time and tell me whether you want to continue further this afternoon or not. And I won't put myself completely in your hands, but I will be largely guided by your judgment on that. So go to it.

(The jury retired at 1:45 p.m.)

(The following transpired in open court, out of the presence of the jury:)

THE COURT: You folks will let us know if you are somewhere not in your offices?

MR. POST: Fine, sir.

MR. SCHWARTZ: We have agreed we are going to get a bite to eat and stay around the courthouse, because it's going to be about a quarter to three by then. Your Honor it going to need us by five.

MR. POST: Two brief points: Number one was as I mentioned earlier, I am not positive our written points for charge included a motion for a directed verdict. In the remote event it doesn't, I do make that motion, and I did make it at the appropriate time, and I put it on the record now.

THE COURT: Right. That motion will be denied.

MR. POST: I'm sorry, I should have let you rule, sir.

Second, I would like to have this marked, this special damage exhibit that was used by Mr. Schwartz, which was the subject of much discussion, marked as a Court Exhibit or D-3, or whatever your Honor wishes, so we can preserve it for the record, sir.

THE COURT: All right.

MR. POST: Thank you.

THE COURT: Call it D-3.

MR. POST: I move for the admission of that for that limited purpose.

THE COURT: Fine. It will be so admitted.

(Recess taken at 1:50 p.m.)

(The following transpired in open court, out of the presence of the jury:)

THE COURT: Folks, we have a message from the jury which is in its entirety as follows:

"May we have a copy of the six points needed to identify liability?"

I would ask counsel what their advice is. Really, I can easily read the six points. I have some question about whether they should be handed to the jury. I guess there is also a question just reading the six points without at least a little putting in context is appropriate, but let me hear what you have to say.

MR. POST: I will be happy to go first, if you want me to, Alan?

MR. SCHWARTZ: Go ahead.

MR. POST: I think the jury has asked for a copy. Is that the word?

THE COURT: That's right — "May we have a copy of the six points needed to identify liability?"

MR. POST: As far as I'm concerned, your Honor, I would just as soon have the six points listed in a copy that they can take back and use to refresh their recollection as to your Honor's charge, as briefly as possible.

MR. SCHWARTZ: I think, your Honor, I have to opt for the Judge giving them the six points, reading the six points with the explanation, because if you give them the six points, three are admitted. The fifth point needs a little explanation, because the fifth point refers to substantial change. So if you just give them the six points, I don't think they'd make any sense at all without some explanation by the Court.

THE COURT: Well, I can give to the jury the six points with the addition to five, five you remember being if a defective condition existed at the time when the

product was sold — I can add that the Court has ruled that the boring mill was in substantially the same condition in 1979, the date of the accident, as it was in 1953, when the mill was sold, and with respect to three, which was the product was without substantial change from the condition it was in at the time of sale, the full statement of that as I gave it was, i.e., that it was in essentially the same condition.

Now, if you are satisfied with my giving them that in writing, as well as reading it to them, Mr. Post and Mr. Schwartz, I'd be perfectly glad to do that.

MR. POST: I would not be satisfied, sir. I think my request would be to comply with the jury's request for a copy of those six points, or, in the alternative, have your Honor read the entire charge over again in reference to those six points, rather than give any undue weight to any of those points in anything that you might send out to the jury.

THE COURT: Well, the six points, as I gave them, contained, well, as I read three, it had added to it the equivalence of essentially the same condition to substantial change, an in giving five I elaborated, as you will remember, on equivalence between the 1979 and 1953 conditions. So it is not a matter of changing the conditions, changing the six points, but it would mean if I gave them those in writing, I think I would feel obliged to be sure that the points given to the jury contained those qualifications, although, if you think I shouldn't do that, I will re-read the portion on liability.

MR. SCHWARTZ: I have no objection to that, your Honor.

THE COURT: All right, that's what I'll do.

MR. POST: May I have a moment for reflection, sir?

Again, so I understand what your Honor would do if it were done in writing, you would list the six points in brevity and then you would say as far as points — may I ask you to repeat, sir? I apologize.

THE COURT: The way it would come out would be this: Here are the six elements the plaintiffs must prove:

1. That the defendant sold or manufactured the product which allegedly caused the accident;

2. That the defendant is in the business of selling or manufacturing the product;

3. That the product at the time of the accident was without substantial change from the condition it was in at the time of the sale, i.e., that it was in essentially the same condition both times;

4. That the product contained a defective condition;

5. That the defective condition existed at the time when the product was sold.

Here I charged the jury that I have ruled that the boring mill was in substantially the same condition in 1979, the date of the accident, as it was in 1953, when the boring mill was sold.

6. That the defective condition was a proximate cause of the injury that Mr. Trapanese sustained.

MR. WRIGHT: I would agree to that worded just that way.

MR. SCHWARTZ: I think, your Honor, you did indicate one, two and three had in fact either been admitted or — is that correct?

THE COURT: Of course, I did say that in my instructions, and it was not recapitulated in what I just gave you. I think if you are making that point, Mr. Schwartz, I think it would be proper, indeed, pretty much obligatory for me to give that, too, to the jury.

MR. SCHWARTZ: Yes, sir.

THE COURT: That if they are to take the six elements in writing, I think they must be reminded that the first three of those are either not disputed or I have in effect ruled on them.

MR. POST: Would you indicate that the first two are stipulated to and the third one has been ruled upon by the Court, which is the fact, sir?

THE COURT: Surely.

MR. POST: Okay. Fine, sir. I'll agree to that.

THE COURT: So it is agreed that I should give that in writing to them?

MR. POST: Yes, sir.

THE COURT: All right.

MR. SCHWARTZ: Will we get a copy of that, your Honor?

THE COURT: Sure. I will go back and prepare it right now.

(A short recess was taken.)

(The following transpired in open court at 5:55 p.m., out of the presence of the jury:)

THE COURT: Hello again. We have two more communications from the jury. The first says at the top, "Element No. 4." And then it says, "No. 1. Are we to consider only the run and jog buttons in our consideration of the defective condition, or may we consider other parts, i.e., other buttons?"

Let me read you the second. It says, "Element No. 6. No. 2."

MR. POST: I'm sorry, 6-2?

THE COURT: Element No. 6. What comes under the caption "Element No. 6" is paragraph labeled "2," the numbering, I'm sure, being that their first communication was No. 1 under Element No. 4. This is now No. 2 under Element No. 6.

"Is it necessary to feel that the defective condition was the primary cause or the most probable cause of the accident, or is it only necessary to feel that it contributed to the accident?"

Now, the second of those questions I think is met simply by re-reading to the jury what I said about the sixth element, which is about proximate cause. I remind you that what I said was this: "The sixth and final element in strict liability is proximate cause. The plaintiff must prove not only that the unguarded buttons on the control station constituted a defect, but also that the defect was a proximate cause of the injuries suffered by Mr. Trapanese. An event or injury is proximately caused by an act of failure to act — in this case defendant's sale of its product in an allegedly defective condition — whenever it appears from the evidence that the act or omission played a substantial part in bringing about or actually causing the injury. The act or omission need not be the only cause of the injury, but it must be a substantial, discernible cause. The fact that some other factor may have caused the injury does not relieve the defendant of liability unless you find that such other cause would have produced the injury independently of defendant's alleged act or omission."

Now, I think that is reasonably responsive to the second question.

As to the first:

"Are we to consider only the run and jog buttons in our consideration of the defective condition, or may we consider other parts, i.e., other buttons?" I think what I would — my own view would be to tell them they are not to consider the gear switch because that has been ruled out of the case.

I'd be glad to know whether you gentlemen have other notions as to what I should say to them?

MR. SCHWARTZ: Your Honor, I think I would agree with that, plus the testimony was that buttons should be guarded, all except the stop button, which should be available under all circumstances. So I guess it would include that you don't guard a stop button because you want to be able to hit that any time, and I

guess the testimony was you guard all bottons but in particular jog and run.

MR. POST: Would you mind reading that question again exactly, sir?

THE COURT: The question is:

"Are we to consider only the —" this is with respect to Element No. 4, I mean that's how they label it — that the boring mill contained a defective condition:

"Are we to consider on the run and jog buttons in our consideration of the defective condition, or may we consider other parts, i.e., other buttons?"

MR. POST: I think the direct answer to that would be only run and jog.

It seems to me what they are getting at, sir, is that gear shift, and the implication is that because that was not working properly they are going to consider pinning that on the manufacturer, and for that reason — well, my statement would be that the plaintiffs' contention from the very beginning of this case, through all discovery and through the trial, has been the contact with the run and jog button. Anything else is beyond the scope of their contentions in this case, sir.

MR. SCHWARTZ: I disagree, your Honor. Our testimony was that the pendant control station should be guarded, particularly the run and stop buttons, and you don't guard — I'm sorry, the run and jog buttons. You don't guard the stop button. That was the testimony in this particular case. Plus, your Honor, defendant's own expert testified that it was his impression that the plaintiff might have accidentally hit the rail down button. So that's imported with the theory that the plaintiff — plus the facts to it were supplied by defense counsel — I'm sorry — by defense witness —

MR. POST: If your Honor please, your Honor has taken the defense of substantial change away from defendants for the reasons your Honor has already indicated, but you see what has happened here. We have the other side of the coin, that because you have taken that

defense away they are making some assumptions that because that switch was not working at the time of the accident, and because the machinery was in the same condition at the time of the accident per your ruling as of the time of the manufacture, they are now thinking in terms of finding my client liable because of that switch, which has nothing to do with this case.

MR. SCHWARTZ: Your Honor, if I might just add one thing — I don't want to belabor the point — the gear shift switch only applies, according to the defendant's manual, to the run and jog buttons. It has nothing to do with the other buttons. It sets up the table, according to their very manual, so that if it is in the run position or normal position, the depression of the run button will not occur but the jog button will.

I am sorry, I got that backward. If you keep it in the normal gear position, you can accidentally hit either one and they will both move. If you put the gear mechanism into the gear shift mode, the run button will not move if you hit it, but the jog button will, and that's what the manual says. So when counsel says that that has anything to do with the other buttons, he is mistaken, and if he gets his manual out the Court can see that.

THE COURT: I'm not really terribly eager to look at manuals at this point. I don't think any of us is. You may remember that I characterized the plaintiffs' case in the instructions, and I think that characterization may be useful again.

What I said was, "The plaintiffs contend that the defendant's boring mill was defective because the buttons — and in particular the run and jog buttons — on the pendant control station were unguarded. They have argued that the unguarded buttons on the operating mechanism made the machine unsafe for its intended use."

Now, it seems to me I can re-read to the jury those two sentences and add that the jury is instructed to disregard the gear switch.

MR. POST: I would ask "disregard anything other than those two buttons," sir, because that has been the entire plaintiffs' case, those two buttons. Plaintiff's contention is he struck one of those two buttons. All the discovery, all the evidence, the whole plaintiffs' case and the whole defense has been geared to those two buttons.

THE COURT: Well —

MR. POST: You see, there are additional problems I just want to call to your Honor's attention, because the issues about the hole in the buttons — for all we know, the missing button might now be attributed to Giddings and Lewis, because your Honor has instructed there was no change from the time of '52 or '53 to '79, and any chance that that jury is thinking along those lines, your Honor, I respectfully say creates a grave injustice here, because of your Honor's ruling.

MR. SCHWARTZ: Your Honor, in response to that, I have no objection if the Court indicates to the jury that we don't deny that you had to guard the button that wasn't there, either, the missing button, if that's his concern, but again, our case is unguarded buttons and that is the defective condition, unguarded buttons, in particular, those two, but the jury has a right to decide in the face of the plaintiffs' evidence and the defense evidence that they may have a right to decide other buttons have something to do with this case.

MR. POST: May I ask —

THE COURT: What other buttons could they connect this case with?

MR. SCHWARTZ: The rail, based on the testimony of Dr. Sander, who said simply that he didn't believe that Mr. Trapanese intentionally hit the rail button.

THE COURT: Well, I have already ruled that out. No, I don't think a verdict could be sustained on any basis other than the run and jog buttons, so, I think I will answer the jury that they are to confine their attention to the run and jog buttons.

All, right, I think that is proper.

(The jury returned at 6:05 p.m., all parties being present.)

THE COURT: My friends, it's good to see you again. I asked you to come in, to respond to your most recent communication.

Is it Mr. Motter? You are the elected spokesperson of the group?

JUROR NO. 3: The lucky one, yes.

THE COURT: You have sent me two questions, and I will take them in sequence.

The first, which is identified as relating to Element No. 4, asks this: "Are we to consider only the run and jog buttons in our consideration of a defective condition, or may we consider other parts, i.e., other buttons?

And my instruction to you is to consider only the run and jog buttons.

Now, the second question, which is designated as relating to Element No. 6, says as follows:

Is it necessary to feel that the defective condition was the primary cause or the most probable cause of the accident, or is it only necessary to feel that it contributed to the accident?"

Now, in that connection, I will read to you once again what I charged you with respect to the sixth element. I will read it twice so that you can get it.

"The sixth and final element in strict liability is proximate cause."

Let me start by reading to you what element number six is, because you don't all have it in front of you:

> "That the defective condition was a proximate cause of the injury that Mr. Trapanese sustained."
>
> "The sixth and final element in strict liability is proximate cause. The plaintiff must prove not only that the unguarded buttons on the control station constituted a defect, but also that the defect was a

proximate cause of the injuries suffered by Mr. Trapanese. An event or injury is proximately caused by an act or failure to act — in this case defendant's sale of its product in an allegedly defective condition — whenever it appears from the evidence that the act or omission played a substantial part in bringing about or actually causing the injury. The act or omission need not be the only cause of the injury, but it must be a substantial, discernible cause. The fact that some other factor may have caused the injury does not relieve the defendant of liability unless you find that such other cause would have produced the injury independently of defendant's alleged act or omission."

Now, I will read it to you again.

"The plaintiffs must prove not only that the unguarded buttons on the control station constituted a defect, but also that the defect was a proximate cause of the injuries suffered by Mr. Trapanese. An event or injury is proximately caused by an act or failure to act — in this case defendant's sale of its product in an allegedly defective condition — whenever it appears from the evidence that the act or omission played a substantial part in bringing about or actually causing the injury. The act or omission need not be the only cause of the injury, but is must be a substantial, discernible cause. The fact that some other factor may have caused the injury does not relieve the defendant of liability unless you find that such other cause would have produced the injury independently of defendant's alleged act or omission."

So that completes my two responses to your two questions, and I know this is a later hour, but I'm happy to wait and continue if you wish to go back and continue your deliberations.

If your folks decide that you want to recess now and come back tomorrow morning, I will be guided by your judgment.

Maybe you'd like to go back and talk among yourselves to determine whether you wish to continue now or recess.

JUROR NO. 3: We had agreed ahead of time, because some people had to make certain connections, if we had not reached agreement by about a quarter after six we would have to come back tomorrow, and it appears that we reached it.

THE COURT: All right. Then I will ask you to come back tomorrow morning at 11 o'clock. I hope you won't mind taking a little longer to wake up in the morning. I'll see you tomorrow morning at 11 o'clock, and we will recess now, and thank you for your hard work, and we will have some more hard work tomorrow.

(Whereupon, the jury retired at 6:10 p.m.)

(The following transpired in open court, out of the presence of the jury:)

MR. SCHWARTZ: Your Honor, I have a distinct impression that what is going through the minds of the jurors here is the conduct on the part of Mr. Trapanese as being one of the things that they are considering in light of the arguemnt —

THE COURT: Excuse me, before we go any further.

(Discussion off the record.)

MR. POST: Mr. Schwartz is going to say something on the merits. I was wondering whether your Honor would think about the suggestion of instead of tomorrow, Monday morning, before the jurors leave.

THE COURT: Well, I think that's a long way to put them off. If counsel were united in that recommendation, I would entertain it, but I'd be kind of skeptical about it.

MR. SCHWARTZ: No, sir. No, I don't believe that's a good idea, your Honor. I think a three-day hiatus would leave them too far away from the facts and the arguments to put everything in proper context, especially since they are apparently down now to question number six.

Your Honor, I have a feeling that this jury is now in its deliberations on proximate cause, weighing the conduct of Mr. Trapanese in relationship to the operation of the machine, particularly in connection with certain arguments made by counsel concerning Mr. Trapanese's positioning the pendant station. We had asked for a charge that contributory negligence is not a defense to this case, as was assumption of risk. We still don't believe assumption of risk is necessarily at issue, but I believe it is important, since the jury is now talking about conduct, what caused this, that the jury be instructed that no conduct on the part of Mr. Trapanese can play any part in their deliberations, because contributory negligence or any conduct on his part is not a defense to a strict liability lawsuit. Counsel interjected this during the trial, your Honor. You are aware I objected to it because I said contributory negligence is not a defense. He argued that point tangentially in his summation and we asked for a point for charge on it.

THE COURT: Well, I would be quite troubled about introducing a new point for charge at this time, especially one would seem so programmatically geared to saying, "Don't go down a particular line which somebody is worried you may be on."

I think the charge as we gave it was a coherent whole which focused the jury's attention on the elements which if proved would entitle the plaintiff to a determination of liability, and I think they should know from the answer which they have received to their question about proximate cause the proper theories to proceed on.

MR. SCHWARTZ: Your Honor, I think the charge is less open in the minds of the jurors that possibly the conduct of Mr. Trapanese could be a substantial factor in bringing it about, i.e., positioning the pendant station so that he hits it or that he in fact might have hit it in some other fashion. In other words, I think what it's done is it's left the jury open to consider his conduct as being a substantial factor in bringing about the happening of the accident, when such would not be a defense to a 402(a) case, especially in light of the arguments made by defense counsel and the evidence that he put on this record about the twisting, if your Honor recalls, the twisting of the buttons, so that it faces the machine as opposed to facing away from the machine, where the plaintiff positioned the specific pendant station. Counsel said that he was there to establish it in terms of how the accident happened, and for that reason the Court let it in, but now the jury is talking about was his conduct, or thinking about, and it's open to them to think about whether his positioning was a substantial factor in bringing about this accident.

THE COURT: Well, I have been monopolizing the conversation. Mr. Post, you may want to participate.

MR. POST: If your Honor please, I don't recall ever bringing in any evidence of the type Mr. Schwartz indicated. I do not recall arguing anything of the type that Mr. Schwartz indicated.

Your Honor made a charge, the first charge I have heard of in many years of trying cases, where both attorneys had not exceptions. That charge was agreed to by both attorneys as being fair and reasonable in expressing the law, and at this point to add new elements and to emphasize new elements would be entirely inappropriate, untimely, and I would object very strenuously, sir.

MR. SCHWARTZ: Your Honor, I agree to that point, but when the jury comes in with a question, and that question leaves open the fact that they are consider-

ing a defense, or the possibility that they may be considering a defense which under the law is not a defense, I see it as the obligation of the Court to instruct them that they are not to consider any conduct on the part of Mr. Trapanese as being a substantial factor, because that would go to a defense they are not entitled to have.

I am not taking away the charge as given; it's correct. But the jury here must be considering, based on what we have in the way the case has developed, must be considering his conduct.

MR. POST: That's funny, I read it just the opposite, sir — just a guess on what they are considering. I read just the opposite as to what they are considering. It never even dawned on me —

MR. SCHWARTZ: Even if it's a guess, it may be something going through their mind. The charge that it's not an element in the case cannot be error, because it is the law of the Commonwealth of Pennsylvania that it is not a defense, so it can't be wrong to do it, and it may clear up confusion.

THE COURT: I appreciate that it can't be wrong in the sense that it wouldn't be a misstatement of the law, but I think the injection of such a new line of legal discussion at this time is so likely to have a kind of coercive effect on the jury's thinking as to be read by them as an impulsion from the Court to decide this case in favor of the plaintiffs on the liability side, I think the risk of that is so substantial, Mr. Schwartz, that I think that would be a wrong thing to do. I am not arguing that had the charge contained such an injunction about the nonrelevance of contributory or comparative negligence that the charge would have been erroneous in some reversible-error sense. I thought it would have been a mistake, and for that reason declined so to instruct the jury, as I would not instruct the jury on lots of matters which are not in my judgment pertinent to the statement of these are the claims that are to be made and these are the appropriate defenses, but although I would not have

regarded it as reversible error, I can put myself in the position presumably of somebody who would have to review such a charge to have included an analysis of the kind that you would urge; I thought it the better part of prudence not to include anything of the sort, and now to do so, unvarnished as a new injection not in the context of a whole large reorganization of a whole conceptual framework would seem to me a wrong thing to do, a form of judicial intervention in the jury's processes that I don't think I am authorized to pursue.

MR. SCHWARTZ: Your Honor, I was under the impression, your Honor, that it would be almost obligatory on the Court when the jury poses a question which has built into it the possibility that they may well be considering the defense to a suit which is not a defense, that it should be done. Now, your Honor has a valid point of taking it totally out of context, so I would suggest, your Honor, you read back exactly what you have read, but simply adding the sentence that this would not apply to any conduct on the part of plaintiff as a substantial factor, and just read it again, read it without any contributory negligence, just add in a little sentence as you read it back to them, and it will be an instruction to them but not out of context, so that the jury doesn't think that anything Mr. Trapanese did, i.e., mispositioning the pendant station, swinging it, getting off without looking, are substantial factors in bringing about this accident.

THE COURT: Well, Mr. Schwartz, I think I understand your position, but I am afraid I respectfully disagree, so I am going to leave the charge as it is.

Now, tomorrow morning, I will come back at eleven. I don't see any need for you folks to be here at 11 o'clock. It's going to be a formal recommitting them to work, which I can do unaided.

Obviously, you are welcome to be present if you wish to be, but I would only say that I would think everybody ought to do the same thing. I don't think the courtroom should have counsel for one side here, or Mr.

Trapanese here with counsel, and nobody for the defendant, or vice-versa. That would seem to me wrong. If the jury comes in and finds nobody here except me, I'll tell them that you haven't disappeared, but you will be readily available when there is something substantial, but that I urged you not to come simply to observe the jury being recommitted to work.

MR. POST: Shall we leave our numbers, sir? I'll be in the office. I can be over in two minutes with a call.

THE COURT: Will you both be at your offices?

MR. SCHWARTZ: No, your Honor, we would be here, because we are a substantial distance away and have a parking problem. My lot is some distance. I'm all the way up at 19th and Delancy, so that—

MR. POST: You can spend your time in my office.

THE COURT: Well, if you want to be here in the courtroom, then I guess I have to ask Mr. Post or—

MR. SCHWARTZ: Why should he be making a living while I'm not?

THE COURT: Mr. Post or Mr. Wright, or some appearance on defense side.

All right, see you at 11 o'clock tomorrow.

(ADJOURNMENT AT 6:30 P.M.)

(The jury returned at 2:55 p.m., all parties being present.)

THE COURT: Well, my friends, you have been working away for quite a while, and I called you in because I wanted to inquire whether you have a view about whether you want to continue on further this afternoon or would like to recess for the weekend and resume Monday morning. I am prepared to follow your advice on

that. This is not an endurance contest, and there is no reason for you to feel coerced; indeed, there is every reason for you not to feel coerced about reaching decisions before you are prepared comfortably to reach them, and we can perfectly easily accommodate ourselves to your preferences.

Maybe you would like to go out and chat among yourselves for a couple of minutes and then come back and tell me how you would like to proceed. Okay?

JUROR NO. 3: Yes.

THE COURT: All right, we'll wait for you.

(The jury retired at 2:58 p.m.)

(The jury returned at 3:15 p.m., all parties being present.)

JUROR NO. 3: We have a request. What we would like is to have a restatement of the answer to our second question yesterday on Element 6, and then the possibility of going back into deliberation for a short time, at least, and if at that point we cannot reach an decision, to break until Monday.

THE COURT: All right.

JUROR NO. 3: Any additional clarification on that would be helpful.

THE COURT: All right. Fine. I'll ask you, if you will, to go back to your room for a moment, and I want to talk with counsel about it, and then I'll call you back in.

(The jury retired at 3:16 p.m.)

(The following transpired in open court, out of the presence of the jury.)

THE COURT: You will remember that the second question I put, the one that I take it they are referring to, the one that's geared to Element No. 6, the question was in the form: "Is it necessary to feel that the defective condition was the primary cause or the most probable cause of the accident, or is it only necessary to feel that it contributed to the accident?"

And what I did by way of response was to read the material on proximate cause in the instruction.

It occurred to me sometime late yesterday evening that though the answer, reading them the proximate cause material again was, I think, appropriate, it was less directly responsive to the question than I think could easily be done, and it seems to me that what I should do is say, "No, it is not necessary to feel that the defective condition was the primary cause, so long as it was a substantial contributing cause," and with that answer, then go ahead and re-read to them the language on proximate cause.

MR. POST: May I, your Honor?

THE COURT: Yes.

MR. POST: I would object, your Honor, and I would object to even reading the law again.

You have already told this jury what the law in Pennsylvania is in reference to proximate cause, on three occasions, and I think that any further amplification at this late stage is inappropriate, and I would object as strenuously as I could. I do not think, your Honor, with due respect to your opinion, sir, that answering that way, as you have suggested, is the law of Pennsylvania, and for the other reason, and more important reason, that you have told them the law of Pennsylvania on three occasions, and they have been deliberating now for two days, and to emphasize and give any additional explanation on that point now would give undue weight to the additional element that you are now proposing to give.

THE COURT: You are not saying, Mr. Post, or are you — are you saying that under the law of Pennsylvania the defective condition must be the primary cause?

MR. POST: No, I'm not saying that, sir. I am saying it has to be a substantial cause, sir, and the word in any other way than what the case law and what the law tells us is law in Pennsylvania is to give undue influence and weight to that other way.

THE COURT: But this is, it would appear from the statement of the question, the first time, and it's now repetition, that the jury perceives a distinction between primary and something less than primary that I think does credit to the sophistication of the jury. I think the language on proximate cause in the charge which they have now heard twice —

MR. POST: Three times, sir.

THE COURT: Three times? Well, all right, three times, I guess that's right. I think it is pretty good language, but it is apparent that they would welcome clarification if it can be provided, but in any event, it's language out of which one could extract the answer to the question they put, but it's aside, if you will. It is not as directly responsive as to say, "No, it is not necessary that it be primary."

MR. POST: My difficulty with the proposition, it seems to me, is what do they mean or what does anybody mean by primary? They might be back there thinking that, "Gee, if the Judge tells us this, we might think that the rail caused 95 percent of this accident and maybe 5 percent had to do with the buttons, and this primary, and this is secondary, and what does that mean?

It seems to me that is not consistent with the law in Pennsylvania, sir.

THE COURT: All right. What is your feeling, Mr. Schwartz?

MR. SCHWARTZ: Well, I agree, your Honor, that this is proper for you to say, "No, it does not have to be the primary."

I think the jury is inviting your Honor to discuss with them the issue of whether or not the plaintiff's conduct can have anything to do with the occurrence in the proximate cause sense because primary, as I understand it, means first in time element.

I assume what they are talking about is the primary incident would have been the plaintiff backing into it. I think again we are back to the issue that the jury is hung up on the plaintiff's conduct as it relates to proximate cause, and based on the *Berkabile* decision, the Court has, as I see it, the obligation to tell the jury that the plaintiff's conduct can play no part in determining the liability because his acts do not relate to any defense in this case, and I think that's what their hang-up is, and that is why I indicated that that has to be clarified, because in terms of sequence, the first thing that would happen would be the plaintiff backed up and hit a button. That would be the prime sequence of events.

MR. POST: That's just the danger with the use of terminology like "primary and secondary," is that it is conceivable that what Mr. Schwartz is saying might have some validity as to what came first and what came second. That's why I think "primary and secondary" really has nothing to do, or I respectfully suggest should not be what the jury is told in response to this question.

I also find fault with Mr. Schwartz' analysis, because my analysis is completely different as to what the problem is. I am absolutely convinced, for whatever it is worth to you, sir, that they heard those witnesses talk about those switches and those missing buttons, and that is what they are talking about, and it's clear to me that is what they are talking about when they are asking the question about whether or not the defect can be elsewhere other than the stop and jog buttons. That were talking about other parts of the machinery.

MR. SCHWARTZ: If Mr. Post's conjecture is right, then the Court's enlightenment on this point cannot prejudice the jury at all on that point, because it would

not relate, but if this is the point that is the logjam, it may very well break up the logs by charging what in fact is the proper charge, and that is the plaintiff's conduct has not application in this case.

THE COURT: Mr. Schwartz, of course we are all speculating. I tend to think that you are wrong in your speculation that primary means to the jury first in time, because the form of their question, if you remember, was, "Is it necessary to feel the defective condition was the primary cause or the most probable cause of the accident, or is only necessary," and so forth.

I read their question as one which equates primariness and probability, and I remain of the view that it would not be appropriate for me now to volunteer to postulate about contributory negligence. Had the jury asked, that would be something else again.

Mr. SCHWARTZ: Your Honor, we requested plaintiffs' additional point — plaintiffs' additional supplemental point for charge, direct evidence of the manner in which the alleged defect caused plaintiff's injuries is not required in a strict liability case. The plaintiff's burden of proving by a preponderance of the evidence that his injury was caused by the alleged defect, unguarded button, can be met by elimination of other reasonable explainable causes, and the cases are cited herein. This again, your Honor, would be under Pennsylvania law, I believe the original had already been given up. It may very well solve that problem after your Honor answers their question, since it answers their question.

THE COURT: Well, I don't really think those cases are apposite, Mr. Schwartz, which is why I didn't give that instruction. This isn't, I think a res ipso loquitur case.

MR. POST: May I say something, your Honor, sir?

THE COURT: Surely.

MR. POST: It has been a lot of hours that the jury has been deliberating. I am sure that we are all anxious to try to protect to this record, and I respectfully say un-

der the circumstances maybe the best thing to do would be have this jury come back on Monday moring and let them deliberate for a half hour or so and see as of that time, when they are refreshed and they have had a chance to deliberate a little further, whether they need any further instructions on this point, sir.

THE COURT: No, I am not going to do that to the jury.

MR. POST: Okay.

THE COURT: I think it's quite disrespectful. They have asked a question, and I think they are entitled to an answer, and they have asked the question before. I have answered it once. It would seem that they would like more if it can be provided, and with all due respect to your respective views, I think the answer that I propose would seem to me one which addresses their question and will, I hope, be helpful to them. It would go farther than you would like, Mr. Post, and not as far as you, Mr. Schwartz, would like, and so I guess I find myself in the usual position of respectfully disagreeing with you both. Perhaps that is what courts are for.

MR. POST: May I have just a moment to look at Mr. Schwartz' point here?

THE COURT: Sure.

MR. POST: May I have just a moment to think about it, sir?

THE COURT: Surely.

MR. POST: Your Honor, I'd be more inclined to have to agree with Mr. Schwartz and ask your Honor to give the charge that he has requested rather than the explanation that your Honor has just proposed. The reason for that, sir, is — I shouldn't say any more than say that.

THE COURT: Well —

MR. SCHWARTZ: Your Honor, my request was to answer the question as you had, and rather than reiterate what you had read earlier, which apparently has not enlightened them, to give them this additional point of

enlightenment. I didn't indicate to the Court that the Court should not be responsive to their question.

MR. POST: Then I misunderstood what Mr. Schwartz said.

THE COURT: You would like me to substitute that for what I propose to do?

MR. POST: Yes, sir.

THE COURT: You wouldn't want me to add to it.

MR. POST: That's right, sir.

THE COURT: All right.

MR. POST: May I hear again, your Honor, exactly what your Honor intends to say?

THE COURT: Yes. I will read them the question. I will read them again their question: "Is it necessary to feel that the defective condition was the primary cause or the most probable cause of the accident, or is it only necessary to feel that it contributed to the accident?"

I will say to them, "The answer to your question is that it is not necessary to feel that the defective condition was the primary cause or the most probable cause of the accident. It is only necessary to feel that the defective condition contributed to the accident, but with the qualification that it must be a substantial contribution to the accident, not just a minute one."

And I will then by way of elaboration — well, I don't think it's necessary to then re-read the language I have given them on proximate cause, but I can do so. I think the answer would be complete at the point that I have just said. And if counsel agree with me that it would be — I appreciate, Mr. Post, that you think this whole approach is wrong, but I am perfectly happy not to burden the jury with a re-reading of the proximate cause language if I respond as I propose to do to the direct question they have put.

On the other hand, I have no difficulty about re-reading the proximate cause language.

MR. POST: If your Honor please, of course, for the record, I object.

THE COURT: Surely.

MR. POST: And in addition, I would ask that you reread the charge on proximate cause after making that statement, sir.

THE COURT: All right, I will do that.

MR. POST: Thank you, sir.

(The jury returned at 3:35 p.m., all parties being present.)

THE COURT: You must be amazed at how long it takes lawyers to formulate an answer to a question. You probably aren't amazed. You know how long it takes us to ask a question.

The question which you want answered again is this one, and this relates to Element No. 6, that which, just to remind you, requires that the defective condition was a proximate cause of the jury that Mr. Trapanese sustained.

Your question was this: "Is it necessary to feel that the defective condition was the primary cause or the most probable cause of the accident, or is it only necessary to feel that it contributed to the accident?"

Let me read it again, it has been a day since you wrote it to me, so you may have forgotten.

"Is it necessary to feel that the defective condition was the primary cause or the most probable cause of the accident, or is it only necessary to feel that it contributed to the accident?"

My answer to you is this:

> It is not necessary that you conclude that the defective condition was the primary cause or the most probable cause of the accident. It is only necessary that you conclude that the defective condition contributed to the accident, with this qualification, that it must be a substantial contribution. It can't be just a minute fractional contribution. So long as it is a substantial contribution, it need not be the primary cause.

Now, having said that, I will then re-read to you the language which I have already read to you at least twice about proximate cause in my instructions, which I think will be confirmatory of what I have just said.

"The sixth and final element of strict liability is proximate cause. The plaintiffs must prove not only that the unguarded buttons on the control station constituted a defect, but also that the defect was a proximate cause of the injuries suffered by Mr. Trapanese. An event or injury is proximately caused by an act or failure to act — in this case defendant's sale of its boring mill in an allegedly defective condition — whenever it appears from the evidence that the act or omission played a substantial part in bringing about or actually causing the injury. The act or omission need not be the only cause of the injury, but it must be a substantial, discernible cause. The fact that some other factor may have caused the injury does not relieve the defendant of liability unless you find that such other cause would have produced the injury independently of defendant's alleged act or omission."

So, in summary, the defective condition, provided that you find by a preponderance of the evidence that it had some substantial causative relation to the accident, it need not be the primary cause or most probable cause.

All right. Now, what is your pleasure? Do you wish to go back and deliberate further now or recess? Or do you want to talk about that?

JUROR NO. 3: I think, if it's all right, I think we would like to go back for at least a brief time.

THE COURT: All right. We are in your hands. You let us know. If after a little while you decide that you want to recess, let us know that.

(The jury retired at 3:40 p.m.)

(The jury returned at 4:35 p.m., all parties being present.)

THE COURT: Well, my friends, you have had a long day. Mr. Green tells me that he understands that you would think it sensible now to recess for the weekend. Is that correct?

JUROR NO. 3: Yes.

THE COURT: Is it your expectation, then, that when you do return on Monday you will be able to move forward?

JUROR NO. 3: In those parameters, yes, I think we can move forward.

THE COURT: Good. Then you can recess now, and if you will come back at 10 o'clock on Monday morning, I'll put you back to work at that time. Meanwhile, I wish you a very merry Christmas and good Christmas weekend.

(ADJOURNMENT AT 4:37 P.M.)

SECTION 1651 OF TITLE 28, UNITED STATES CODE

A). The Supreme Court and all Courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

F.R.C.P. 51

INSTRUCTIONS TO JURY: OBJECTION

At the close of the evidence or at such earlier time during the trial as the Court reasonably directs, any party may file written requests that the Court instruct the jury on the law as set forth in the requests. The Court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the Court shall instruct the jury after the arguments are completed. No party may assign an error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds for his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

F.R.C.P. 59(d)

ON INITIATIVE OF COURT

Not later than 10 days after entry of judgment the Court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the Court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the Court shall specify in the order the grounds therefor.